FILE COPY

73-53

FILED

JUL 2 1973

MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-53

NICHOLAS LaSORSA and
SALVATORE CAIO,

Petitioners,

-against-

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAY GOLDBERG
Attorney for Petitioner
NICHOLAS LaSORSA
Office & Post Office Address
299 Broadway
New York, New York 10007
Telephone: (212) 374-1040

H. ELLIOT WALES
Attorney for Petitioner
SALVATORE CAIO
Office & Post Office Address
90 Park Avenue
New York, New York 10016
Telephone: (212) 687-7200

July 2, 1973

INDEX TO BRIEF

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement of the Case	3
Reasons for Granting the Writ	8
1. The Prosecution Summation was Prejudicial and Denied Petitioners a Fair Trial	9
2. The District Court Committed Plain Error in Failing to Give an "Accomplice Witness" Charge..	15
3. The District Court Erroneously Allowed the Government Witness Brown to Assert the Fifth Amendment During Cross-Examination, Thus Improperly Foreclosing Further Questioning.	23
4. It was Constitutional Error to Substitute Another Judge on the Final Day of the Trial	28
Conclusion	31
APPENDIX - Court of Appeals Opinion .	1a

CASES CITED

	Page
Randall v. Beto, 354 F.2d 496 (5th Cir. 1965)	29
United States v. Becker, 62 F.2d 1007 (2d Cir. 1933)	17
United States v. Benter, 457 F.2d 1174 (1972)	11,13
United States v. Cianchetti, 315 F.2d 584 (2d Cir. 1963)	23
United States v. Ellis, 416 F.2d 791 (D.C. Cir. 1969)	27
United States v. Freeman, 227 Fed. 732 (2d Cir. 1915)	29
United States v. Griffin, 382 F.2d 823 (6th Cir. 1967)	20
United States v. Owens, 460 F.2d 268 (10th Cir. 1972)	21
United States v. Tillery, 411 F.2d 644 (5th Cir. 1969)	17

STATUTES CITED

	Page
FRCrP 25	9,29
Title 26, USC,	
Sec. 4705(a)	2
Sec. 7237(b)	3

AUTHORITIES CITED

Uniform Rules of Evidence,	
Rule 37	27

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO.

NICHOLAS LaSORSA and
SALVATORE CAIO,

Petitioners,

-against-

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To the Honorable The Chief Justice, and
Associate Justices of the Supreme Court
of the United States:

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 11, 1973.

OPINION BELOW

The opinion of the Second Circuit rendered on June 11, 1973, is annexed in the Appendix hereto, p. 1a, *infra*.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

1. Whether the prosecution summation, injecting the credibility of the Government, was so prejudicial as to deny petitioners a fair trial.

2. Whether the District Court committed Plain Error in failing to give an accomplice witness charge.

3. Whether the District Court deprived petitioners of a fair trial by upholding the claim of the key government witness to a fifth amendment right to refuse to answer after the witness had testified at an earlier trial without invoking the privilege.

4. Whether the petitioners' sixth amendment right was violated by the substitution of a different trial judge on the final day of the trial.

STATUTES INVOLVED

Section 4705(a) of Title 26, USC, as applicable, recites:

> "It shall be unlawful for any person to sell, barter, exchange or give away narcotic drugs except in pursuance of a written order of the person to whom such article is

sold, bartered, exchanged or given away on a form to be issued in blank for that purpose by the Secretary of the Treasury or his delegate..."

26 USC 7237(b), as pertinent, reads:

"Who ever commits an offense or conspires to commit the offenses described in Section 4705(a) shall be guilty of a crime."

STATEMENT OF THE CASE

Petitioners Nicholas LaSorsa and Salvatore Caio seek relief from the judgments of conviction entered in the U. S. District Court, Southern District of New York, on January 15, 1973, after a trial before the Hon. Lee P. Gagliardi, U. S. District Judge and jury. Affirmance was on June 11, 1973.

The indictment charged that during the period from May 1, 1968 to January 18, 1972 (date of indictment), Nicholas LaSorsa and Salvatore Caio, the only defendants, together with James Brown and others, conspired to sell narcotics, without the use of the written order form, as required by 26 USC 4705(a) and 7237(b). (R.598)(A.10a).

Each petitioner was convicted on the one count indictment. Each received a sentence of five years.

An earlier trial before Hon. Marvin E. Frankel, U. S. District Judge, in May 1972, had resulted in a hung jury.

The Court of Appeals stated the facts thusly:

> "After a five day jury trial in the United States District Court for the Southern District of New York, the defendants-appellants, Nicholas LaSorsa and Salvatore Caio, charged in a one-count indictment, were convicted of conspiracy to sell heroin without the buyer's written order form in violation of Title 26, United States Code, Sections 4705(a) and 7237(b), and were sentenced to mandatory prison terms of five years each. At the trial, the Government, in seeking to establish the defendants' guilt, rested its case primarily on the testimony of its star witness, James Brown, a convicted felon then out on parole from a seven year prison term imposed on him by a New York state court for robbery and conspiracy to kidnap. Brown was named in the indictment as a co-conspirator of the defendants although he was not charged as a codefendant. Upon taking the stand as the Government's key witness, Brown testified that from May 1968, to April 1969, he was employed on a commission basis by the defendants to sell heroin on the defendants' account at prices ranging from $26,000 to $30,000 per kilo. He stated that during this period he was able to arrange a number of transactions in New York City and that for each kilo he sold he received from the defendants a $1,000

sales commission. He also testified that at his initial introductory meeting with the defendants he was instructed by them that whenever he had a buyer who wanted heroin he was to contact the defendants by calling LaSorsa at LaSorsa's place of business, Dale Oldsmobile, and asking for a Mr. Clark. At this first introductory meeting, after LaSorsa had instructed him to call Dale whenever he had a purchaser, LaSorsa also handed him a business card with LaSorsa's private telephone number at Dale handwritten on the card, and this card was introduced into evidence as a government exhibit. He further stated that during the course of his subsequent business relationship with the defendants he had called LaSorsa at Dale many times to inform him that he had set up buys and that he had even visited Dale on about thirty occasions to meet with LaSorsa personally. Brown concluded his testimony by detailing the ways in which he had brokered large quantities of heroin for the defendants during his 11 months of association with them. During this part of his testimony he spoke at length, and apparently convincingly, about the details of his many transactions, and especially about his sales to two retailers of heroin, "Goldfinger," his Harlem connection, and Luther Hazel, the Government's next witness.

"Hazel had been named in one of the overt acts listed in the indictment as furthering the alleged conspiracy, as having received heroin from Brown, and, in the bill of particulars the Government furnished the defense, was characterized as one who "might be considered" a co-conspirator. Hazel's testimony related to an incident which occurred after he had made his first, and only, purchase from Brown. As Hazel's workers had been unable to resell the drugs on the street quickly enough to raise sufficient cash to pay the purchase price of $30,000 he did not make his payment to the defendants on the day it was due. Shortly thereafter he met with Brown and the defendants in an automobile, and while Caio held him at gunpoint in the car LaSorsa demanded payment and, to drive the point home, hit him in the face several times. Eventually Hazel paid $23,500 on the account, leaving unpaid a balance of $6,500, plus $2,000 or so borrowed to pay Hazel's packaging helpers. LaSorsa told Brown to forget this balance.

"The remainder of the Government's direct case was devoted to introducing evidence tending to support the testimony that had been given by Brown. In order to establish the fact that Caio had been involved with narcotics on other occasions, the Government

introduced the testimony of Neil McMillan, a three time felon then serving a Virginia state sentence for his third conviction. McMillan stated that three times during 1968 and 1969 Caio, as part of a separate retailing business, had employed him at a salary of $5,000 a week to dilute and package heroin. Also, in order to verify a Brown statement that he and Tony LaSorsa, brother of Nicholas LaSorsa, had counted in the apartment of Audrey Flynn, Tony's girlfriend, money they had received from 'Goldfinger,' the government produced Flynn, who stated that she had indeed seen Brown and Tony counting money in her apartment.

"Neither of the defendants testified in his own behalf, but the defense attempted to prove by other witnesses that the testimony of Brown and Hazel was not to be believed. The owner of Dale Oldsmobile and a current and a former employee of Dale (both of whom had worked at the telephone switchboard) established the fact that no one named Mr. Clark had ever worked at Dale and that, to their knowledge, no one had ever called in and asked for a Mr. Clark. Although this testimony was meant to show that Brown was lying when he said he had called Dale many times and had asked for Mr. Clark, the prosecution established on cross-examination that LaSorsa had a private line at Dale and that

calls from Brown to him probably would go through the private line noted on the card he gave Brown rather than through the main switchboard. The defense also attempted to prove that Brown's testimony was not to be believed because it differed from the story he had given to an FBI agent while Brown was an inmate at Sing Sing Prison. Although the defense was able to establish that Brown, when he first spoke to the agent at Sing Sing on July 9, 1970, made some statements that differed from portions of his trial testimony, the Government, on cross-examination of the agent, showed that in most respects the July 9 story was substantially the same as the testimony given at trial, and that, in any event, the story Brown gave at five subsequent meetings in Sing Sing with the same FBI agent was exactly the same story he gave at trial. In any event, the jury believed Brown's trial testimony, and, after one day of deliberation, reached a guilty verdict as to both defendants."

REASONS FOR GRANTING THE WRIT

This case presents this Court with an opportunity to resolve a conflict between the Circuits as to the affect of the failure to fully instruct the jury relative to the caution it should exercise in evaluating accomplice witnesses. The Fifth, Sixth and Tenth Circuits hold it to be plain error not to so instruct while the Second Circuit

holds it is not "plain error" in the absence of a defense request.

Further, this case affords this Court the opportunity to instruct on the limits to which a prosecutor may inject the credibility of the Government in order to bolster its case during summation.

This case also provides an opportunity to define the extent of the doctrine of waiver of the right a witness otherwise may have to refuse to answer a question when he has at an earlier trial freely responded thereto.

Finally, the Court can determine whether the substitution of another judge on the last day of a trial, this pursuant to FRCrP 25, nontheless violates a defendant's sixth amendment right.

1. THE PROSECUTION SUMMATION WAS PREJUDICIAL AND DENIED PETITIONERS A FAIR TRIAL.

The Government's case consisted solely of testimony from persons with deep involvement in the narcotics business, each of whom had lived a total life of crime, as evidenced by numerous convictions for substantial offenses - kidnapping, burglary, possession of a dangerous weapon, and robbery. There was not a single Government agent or employee who testified, nor was there any evidence from a witness whose credibility was not subject to the most profound doubt. Also the evidence established that Brown and Hazel shared a cell at the Federal House of Detention, and of

critical importance, they discussed what testimony they would give at the trial (R.279).

With the thinness of the proof (resting solely on accomplice testimony) it was grossly improper for the prosecution, in summation, to bolster the credibility of the accomplice-witnesses, by placing the prestige of the United States Attorney and the United States Bureau of Narcotics behind their testimony, by stating to the jury (R.562,563,582) (A.29a,30a,49a):

> "Is that what you believe happened? *Do you believe Governmental agencies went around and told these people to frame up innocent men?* That is an outrageous charge, and if you believe it, acquit, acquit with the Government's blessing, because that is an outrageous thing to do, and nobody in this court, in the House of America, should be convicted on a *frame-up* of evidence put together in that way.
>
> "You can see for yourselves that that has not been done, because look at the inconsistencies in the story. *If the Government* or these people *had gotten together to frame,* wouldn't they get the stories together? Wouldn't the stories mesh in some way? It is a simple matter." (Emphasis added).

* * * *

> "If the Government was framing, wouldn't they have shown him a photograph and said, "isn't this they guy? You say the guy is part of the deal." Obviously, that did not happen."
>
> * * * *
>
> "O.K., so much for that. *If you think the Government framed these guys,* go ahead, you acquit them. That is fine." (Emphasis added).
>
> * * * *
>
> "What does the defense amount to here? The defense is, in short, all those witnesses are lying. If you think about it for a moment, they are saying worse than that. *They are saying all these witnesses were told what to say, because you remember they do not know each other. fn.* That is the defense here." (Emphasis added).

The summation in this case was strikingly similar to the one recently condemned in *United States v. Benter*, 457 F.2d 1174, 1176-1177 (1972), decided six months prior to the trial at bar. As such, the United States Attorney was alerted to what arguments would not be tolerated. Judge Oakes wrote (457 F.2d at 1176, 1178):

---

fn - On the contrary - Hazel and Brown were lodged together at the Federal House of Detention at West Street. They spoke continuously to each other, and they spoke about the testimony each was prepared to give in court. (R.279).

"The Government replies - objected to after, but not during, the summation - consisted in the main two lines of argument, neither put in such a way as to be unobjectionable. First, counsel stated that if the jury thought 'for one minute that this is a frame, that the United States Attorney's office and the FBI got together with the so-called four crooks and paraded them in here to frame this defendant, you should acquit him.'

"The references to a 'frame', while hardly expressed in language appropriate to the proper exercise of the prosecutorial function - which it will be remembered is not to win a case, but to see that justice is done - did serve to put, as appellant claims, the prestige of the United States Attorney's office and the FBI behind the Government's case. *Ordinarily this is improper.* See United States v. Puco, 436 F.2d 761, 862 (2d Cir. 1971) (2-1 decision). (Emphasis added).

* * * *

"We are reminded in summation cases that repeated rebukes of the prosecution by an appellate court without reversal may ultimately become 'an attitude of helpless piety,' and our 'deprecatory words . . . purely ceremonial.' Frank, J., dissenting in United States v. Antonelli Fireworks Co., 155 F.2d 631, 661 (2d Cir.), cert. denied,

329 U.S. 742, 67 S.Ct. 49, 91 L. Ed. 640 (1946). *We trust that the rebukes in United States v. Isaza, supra, and here, however will not go unheeded by the prosecutorial staff involved, for another time the evidence of guilt may be less convincing and the likelihood of prejudicial error correspondingly higher.*" (Emphasis added).

It is submitted that the evidence of alleged guilt is far less convincing in the case at bar than it was in *Benter*. The conduct of the prosecutor in intruding the prestige of the Government to support the word of the three habitual criminals was highly prejudicial in that it served to divert the jury's attention from the real issue of the terribly thin prosecution case.

Despite the ruling of the Court of Appeals, the Government summation cannot be considered "fair comment," for the defense did not suggest that the Government agents had "framed" the petitioners, or that Government agents or attorneys had induced the prosecution witnesses to concoct a story implicating the men on trial. To be sure, the defense justifiably had attacked the prosecution witnesses as totally lacking in credibility. In one succinct passage the defense fully stated its basic contention: "...it comes down to: Do you believe the witnesses or don't you believe them?" (R.537-538). Defense counsel specifically exempted the United States Attorney from being a party to the lack of credibility of the witnesses (R.532):

> "I am in no way trying to criticize Mr. Velie. He is a good assistant United States Attorney, he is a fine man. I am not laying anything at Mr. Velie's doorstep, because maybe it is like Mr. Velie says, he takes them where he finds them."

In no way did the defense mention the term "frame" or suggest any improprietary on the part of any Government agent or attorney. We must recall not a single Government agent, or employee, or attorney testified for the prosecution. Neither had the defense suggested that the prosecution witnesses had developed their testimony as a result of pressure, or inducement by Government employees. As such the Government in summation raised a "Red herring," which had the effect of misleading the jury, and unfairly bolstering the Government's case.

It is improper for the prosecutor to place the prestige of the United States Attorney or the United States Bureau of Narcotics before the jury when their prestige was never an issue or even questioned. It was prejudicial for the prosecution to resort to the prestige of the United States Attorney, or the federal government as a whole, when no federal agent testified and no United States Attorney testified. It was also wrong for the prosecution to suggest that the United States Attorney or the narcotic agency would never bring a criminal prosecution that did not warrant a conviction, unless the jury could find that the defendant was framed by the United States Attorney, the Bureau of Narcotics, and the Government witnesses, all acting in concert.

In this case, the prosecutor resorted to prejudicial arguments which served to deprive petitioners of a fair trial.

2. THE DISTRICT COURT COMMITTED PLAIN ERROR IN FAILING TO GIVE AN "ACCOMPLICE WITNESS" CHARGE.

In discussing the standards to be applied in evaluating the credibility of a witness, the district Court stated (R.611)(A.80a):

> "You have heard testimony from witnesses who told you in effect that they were themselves involved in the alleged conspiracy or in the achievements of its objects. One of those witnesses, James Brown, is specifically named in the indictment as a co-conspirator, although not as a defendant. Your experience will probably indicate to you that the Government, not infrequently, deems itself compelled to rely on testimony of accomplices or persons whom they produce here. The arguments have been made on both sides of that situation by counsel and I am not going into it any further.
>
> "In each case your concern is always whether the testimony was a fabrication, in whole or in part. Did the witness think he would benefit by lying? As I have said before, you consider the motive, demeanor, character, along with the subject of his role as an alleged accomplice in resolving your ulti-

> mate determination as to the extent to which you may place credence in that person's testimony."

The District Court failed to give the "accomplice witness" charge. The Court failed to tell the jury that the testimony of an accomplice must be "scrutinized with care and caution."

The Government's case in toto was made up of accomplice testimony. Each witness - Brown, Hazel, and McMillan - was an admitted participant in numerous narcotic transactions in 1968 and 1969, including the very transactions to which they testified. None of the three was indicted for the episodes on trial. Each had numerous criminal convictions. Brown and Hazel conceded that they discussed their proposed testimony at great length with each other while both were together at the Federal House of Detention. In no way was the Government's case corroborated by non-tainted evidence. No Government agents, or attorneys, or employees testified. The prosecution did not have any exhibits of drugs. There were no admissions or confessions; nor was there any search and seizures.

In contrast, the defense witnesses were credible and free of taint. None of them was a participant in any illegal endeavors; none of them was tarnished by a criminal record: Mark Rosenstock was the owner of a substantial business; Shirley Lerner and Edwina Burns devoted employees.

As such, the Trial Court erred when it suggested to the jury that all witnesses are to be judged in similar fashion. The District Court erred, to the detriment of the defense, when it failed to instruct the jury that the testimony of the prosecution witnesses (and not the defense witnesses) should be considered "with caution and care" because of the nature of their testimony. As the quality of the defense witnesses was in striking contrast to the character (or lack of it) of the prosecution witnesses, the Trial Court failed substantially when it did not advise the jury that the defense witnesses should be evaluated quite differently from the prosecution witnesses. Since the entire Government case was complete with accomplice testimony, it was vital that the jury know that the law looks with suspicion and disfavor upon accomplice testimony. Reasonable doubt takes on additional significance when the jury is instructed to be doubly careful in evaluating accomplice testimony.

The necessity for an "accomplice testimony" charge is so vital in certain cases that several Circuits have held the failure to so charge "plain error," even in the absence of a defense request. In *United States v. Tillery*, 411 F.2d 644, 647-648 (5th Cir., 1969), the Fifth Circuit relied upon Judge Learned Hand's opinion in *United States v. Becker*, 62 F.2d 1007 (2nd Cir., 1933) and reversed a transportation of stolen goods conviction because of the

omission of the trial judge, even though defense counsel had not protested. The Court stated (411 F.2d at 647, 648):

> "The failure to warn a jury about accomplice testimony is not necessarily reversible error in all cases.
>
> * * * *
>
> "It is the better practice, however, to caution juries against too much reliance upon the testimony of an accomplice and to require corroborating testimony before giving credence to such evidence. The warning is not an absolute necessity in all cases. *However, as Judge Learned Hand indicated in United States v. Becker, 2 Cir. 1933, 62 F.2d 1007, the failure to give the warning in close cases, * * * may turn the scale.* (Emphasis added).
>
> "In Williamson v. United States, 5 Cir. 1964, 332 F.2d 123, this court exercised its right to consider plain error and reversed a conviction because of the trial court's failure to admonish the jury to scrutinize narrowly the testimony of an accomplice. The Williamson case is strikingly similar to the case sub judice. In neither case did the defendant preserve the error by making a request for an appropriate charge regarding accomplice testimony. In both cases, the prosecutor's hope for a conviction hinged solely upon

the persuasiveness of accomplice testimony. In both, there was an indication that, because of previous conduct on the part of the witness, the testimony proffered was particularly suspect. In view of these similarities, we feel that Williamson controls the disposition of the instant case. This court has given prior recognition to the verity of Judge Hand's observation that, in close cases, whether the warning is given to the jury may turn the scale. See Williamson, supra, and Pina and Lyles, supra, footnote 1. Yet, in the instant case, each juror had to weigh the evidence as to Mr. Tillery's guilt or innocence and reach a difficult, delicate decision without the benefit of an instruction to monitor Padgett's testimony with caution.

* * * *

"Consequently, the jury must ponder the veracity of an accomplice's damaging testimony cast in its proper light. By failing to warn the jury about Padgett's reliability in this case, the trial court presented the evidence to the jury in an improper perspective, and the jury may have felt bound to accept it as true. Padgett's crucial testimony was extremely unreliable, if not incredible and unsubstantial, in view of his earlier contradictory statements in which he indicated less concern with the truth than with his own skin. When these

> circumstances are coupled with the fact that Padgett's testimony comprised the sum total of the evidence against the defendant, the trial court's failure to warn the jury about the accomplice testimony emerges as plain error, the remedy for which is to reverse and remand the case for a new trial. As the court indicated in Williamson, in less critical cases, it might be within the trial court's discretion to omit an instruction on accomplice testimony, but in a crucial evidentiary situation, as here, where the evidence of the accomplice may be incredible or unsubstantial, the trial judge himself is under an obligation to appropriately apprise the jury of the potentially unreliable nature of the accomplice's testimony. *In the instant case, the jurors were not properly advised on this score, and the failure of the court to so advise them has such significant consequences that we are compelled to hold that such failure was plain and reversible error."* (Emphasis added).

In *United States v. Griffin,* 382 F.2d 823, 829 (6th Cir. 1967), the Sixth Circuit reversed a narcotic conviction, in spite of the failure of defense counsel to request an accomplice witness charge. Again the Court of Appeals was troubled by the fact that the Government's case consisted solely of accomplice evidence. In reversing, because of "plain error," the Court wrote (382 F.2d at 829):

> "Griffin had a clear right to have the issue of the informer's credibility submitted to the jury'* * * with careful instructions * * *.' On Lee v. United States, supra, 343 U.S. at 757, 72 S.Ct. 967. Not one witness, other than the informer Blassingame, spoke one word as to any criminality on the part of the defendant Griffin. Under these exceptional circumstances, the lawyer assigned to defend him should have requested the special cautionary instruction. We have no doubt that the District Judge in this instance would have granted the request and given the charge. But, whether emanating from the fault of the attorney or from judicial error, plain error occurred when Griffin was not accorded his right. 'Careful instructions', under the exceptional circumstances presented herein, demanded a charge as to the jury's evaluation and use of the testimony of the addicted informer. Its absence herein worked substantial prejudice to the defendant."

The Tenth Circuit joined the Fifth and Sixth, and in *United States v. Owens*, 460 F.2d 268, 269 (10th Cir. 1972), reversed the conviction for interstate transportation of forged money orders because of the same deficiency - failure to charge the jury on the significance of accomplice testimony, even though not requested to do so by the defense. Judge Barrett wrote (460 F.2d at 269):

> "While one can be convicted on the uncorroborated testimony of accomp-

lices, Johns v. United States, 227 F.2d 374 (10th Cir. 1955), we have held that the Court must instruct the jury as to the manner in which such testimony should be considered. Butler v. United States, 408 F.2d 1103 (10th Cir. 1969). To the same effect, we have held that 'if the incriminating testimony of an informer is uncorroborated or unsubstantiated, special cautionary instructions are surely required.' Todd v. United States, 345 F.2d 299, 300 (10th Cir. 1965).

* * * *

"In United States v. Birmingham, 447 F.2d 1313 (10th Cir. 1971), Judge Hill stated that in this Circuit a cautionary instruction is required. The Court said:

> 'The rule is established in this Circuit, however, that the court must instruct the jury that testimony of accomplices must be carefully scrutinized, weighed with great care, and received with caution.' 447 F.2d at 1317.

Here the testimony of the accomplices is the only evidence directly implicating Owens.

* * * *

"Under such circumstances the trial judge is obligated to properly apprise the jury of the potentially unreliable nature of the accomplices' testimony by means of a special cautionary instruction.

> *"We hold that failure of the Court to give a specific cautionary instruction on the testimony of acknowledged accomplices York and Humphrey was plain and reversible error."* (Emphasis added).

The Second Circuit does not view the failure to so charge as plain error. *United States v. Cianchetti*, 315 F.2d 584 (2d Cir. 1963).

It is not correct to state as did the Court of Appeals at page 4101 of its opinion, that the defense failed to request this charge. In two post argument letters the Court of Appeals was advised that despite the fact the record was silent, such a request to charge was made by the defense and prosecution though concededly no exception was taken when the Court failed to charge as requested.

Intervention by this Court is necessary to resolve the conflict between the Circuits.

3. THE DISTRICT COURT ERRONEOUSLY ALLOWED THE GOVERNMENT WITNESS BROWN TO ASSERT THE FIFTH AMENDMENT DURING CROSS-EXAMINATION, THUS IMPROPERLY FORECLOSING FURTHER QUESTIONING.

During the course of defense cross-examination of the Government witness James Brown, the District Court erroneously allowed Brown to claim the privilege against self-incrimination, and allowed him to refuse to answer one question which he had previously answered at the first trial.

At this trial defense counsel asked James Brown (R.117) (A.13a):

"Q. Mr. Brown, other than the convictions which you had related to the jury, which you have been convicted of, are there any other criminal acts which you have committed?

* * * *

THE COURT: . . .

I will inform you, Mr. Brown, that you have a right, a fifth amendment right, not to answer any question that you feel might tend to incriminate you. You may obtain the assistance of counsel to assist you if you find it necessary.

* * * *

A. I refuse to answer that question on the grounds it may incriminate me."

At the earlier trial, in the proceedings held on April 28, 1972, 72 Cr. 52, District Judge Marvin Frankel advised James Brown of his privilege against self-incrimination with respect to questions that may be asked regarding other crimes (Record of first trial, 26-28) (A.18a,19a,20a):

THE COURT:

"Q. You just mentioned an apparent crime for which I gather you have never been prosecuted or convicted, is

that right, this stickup of a hoodlum?

A. Yes.

THE COURT:

"Now, I want to say a couple of things to you. First of all I think you know, but if you don't, let me remind you, or let me tell you that under the situation you have the privilege against self-incrimination.

* * * *

Now it is very possible, indeed, I think it is probable, that if you were asked about that stickup that you just blurted out your testimony about you can plead your privilege and refuse to answer.

* * * *

The lawyers for the defense want to ask you questions about other possible criminal behavior for which you haven't been indicted or convicted and I don't know what your answers would be or how you personally feel about that. But you don't have any immunity here and you don't have any immunity as a result of testifying at this moment, so if you are asked about crimes other than those for which you have been convicted or that are not known already to the authorities you are entitled to plead your privilege.

* * * *

> If you are asked a question about some crime and you think that answering it may get you into trouble and you want to rely on your privilege, you may not be sure whether you have a right to rely on it or not so that you may stop the inquiry at that point and ask to get some guidance."

After taking into consideration the advice given him by Judge Frankel, James Brown waived his Fifth Amendment privilege, and answered the following line of questions (Record of earlier Trial, 30-31) (A.22a,23a):

"Q. Now Mr. Brown, you said that you alone with two other people stuck up a hoodlum in the Bronx, is that correct?

A. Yes.

Q. And you said that when you got to Richard Butts' apartment this stickup had already been planned and you just went along with them?

A. Yes.

Q. And although at the time of the stickup you held a gun on the individual, is that right?

A. I had one. I didn't hold it on him.

* * * *

Q. In that explanation you detailed it that you stuck up a man in the Bronx, is that correct?

A. Yes."

The Trial Judge stated several times that he had read the entire transcript of the first trial and was fully familiar with all that transpired (R.111). As a result he knew full well that Brown had answered these questions at the first trial, after being advised of his self-incrimination privilege by Judge Frankel. The Trial Judge knew at that point that Brown had knowingly and intelligently waived them at the first trial when he answered questions about other crimes.

Rule 37 of the Uniform Rules of Evidence states:

> "A person who would otherwise have a privilege to refuse to disclose . . . a specified matter has no such privilege with respect to that matter if the judge finds that he . . . without coercion and with knowledge of his privilege made disclosure of any part of the matter . . . ."

In *United States v. Ellis*, 416 F.2d 791, 800-805 (D.C. Cir. 1969) the District of Columbia Circuit held that a witness who had voluntarily testified before the grand jury which returned the indictment in question, and had not invoked the privilege of self-incrimination before the grand jury, though he was aware of it, could not at the trial successfully assert that privilege as a basis for refusing to testify at the trial. (In *Ellis*, the proceedings were not the same. In the case at bar the proceedings (i.e. a trial) were the same.)

The defense had made it crystal clear that the purpose of the line of inquiry was to establish possible motive for testifying, i.e. bias in favor of the Government. The theory was that since the Government was aware of the crimes from Brown's testimony on the earlier trial before Judge Frankel there might well be the expectation that the witness had to favor the Government lest the admissions be turned over to local authorities. The record from 103-116 reveals that the defense sought to establish the crimes, not to prove bad acts but for the clear purpose of demonstrating motive. Invocation of the privilege was improper. The Trial Court's familiarity with the earlier trial should have caused it to refrain from sua sponte raising the privilege with this key witness. And invocation of the privilege should have been held to be improper.

The action of the Trial Court, sustained by the Court of Appeals, improperly foreclosed development of a vital issue going to the believability of the prosecution witness.

4. IT WAS CONSTITUTIONAL ERROR TO SUBSTITUTE ANOTHER JUDGE ON THE FINAL DAY OF THE TRIAL.

On the fifth (and last) day of the trial, while the jury was deliberating, District Judge Arnold Bauman appeared in place of District Judge Lee P. Gagliardi, who had presided during the prior four days of this short trial (R.635-637). While the defense attorneys agreed to the substitution of judges, the petitioners did not agree

(R.636-637). The record does not show that the petitioners were ever advised by either the trial court or their counsel as to the significance of what was happening. The proceedings were in the Robing Room and petitioners were not present (R.635-636) (A.87a-88a).

The record shows that Judge Bauman took an active role: testimony of a witness was read immediately (R.639-640), and after another jury note, additional testimony was read (R. 640); later he accepted the jury verdict (R.645).

Petitioners contend that it is a violation of the Sixth Amendment right to a jury trial to change trial judges in the midst of a trial without defendants' consent. As such it is submitted that Rule 25 (a), FRCrP, is unconstitutional [see *United States v. Freeman*, 227 Fed. 732 (2d Cir. 1915).

In *Randall v. Beto*, 354 F.2d 496, 503 (5th Cir. 1965), the Court noted: "serious constitutional problems are created by the substitution of judges." (354 F.2d at 503).

On one prior occasion the Second Circuit discussed the problem posed by the substitution of one trial judge for another in the midst of a criminal trial, and held that the Sixth Amendment right to trial by jury and the Fifth Amendment right to due process foreclosed such a switch. In *United States v. Freeman*, 227 Fed. 732 (2d Cir. 1915), the Court reversed the fraud conviction because of a substitution of judge made at the close of the presentation of the Government's evidence. The defendants

had consented to the replacement, 227 Fed. at 724, yet the Court did not apply the waiver principle (227 Fed. at 758) and wrote (227 Fed. at 759-760):

> "It is the opinion of this Court that in a criminal case, trial by jury means trial by a tribunal consisting of at least one judge and twelve jurors, all of whom must remain identical from the beginning to the end. It is not possible for either the government, or the accused, or for both, to consent to a substitution either of one judge for another judge, or of one juror for another juror. The continuous presence of the same judge and jury is equally essential throughout the whole of the trial."

In the case at bar there was no consent by petitioners nor any intelligent waiver of their Sixth Amendment right.

CONCLUSION

FOR THESE REASONS, THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

JAY GOLDBERG
Attorney for Petitioner
NICHOLAS LaSORSA

H. ELLIOT WALES
Attorney for Petitioner
SALVATORE CAIO

APPENDIX - Court of Appeals Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 795—September Term, 1972.

(Argued April 17, 1973 Decided June 11, 1973.)

Docket No. 73-1210

UNITED STATES OF AMERICA,

Appellee,

—v—

NICHOLAS LASORSA and SALVATORE CAIO,

Defendants-Appellants.

Before:

CLARK, *Associate Justice,**
WATERMAN and FEINBERG, *Circuit Judges.*

After a jury trial in the United States District Court for the Southern District of New York, Gagliardi, *J.*, the defendants were convicted of conspiracy to sell heroin without the buyer's written order form in violation of 26 U.S.C. §§ 4705(a) and 7237(b). Defendants appealed on the grounds that: (1) the prosecutor used prejudicial language in his summation before the jury, thereby placing the Government's prestige behind its witnesses; (2) the trial judge committed "plain error" in failing to fully instruct the jury relative to the caution it should exercise in evaluating

* Associate Justice of the United States Supreme Court, Retired, sitting by designation.

the testimony of government witnesses who were accomplices to the defendants; (3) the trial judge committed trial errors with respect to certain rulings on the admissibility of evidence; and (4) the defendants' right to a jury trial was abrogated by the substitution of one judge for another on the final day of the trial.

Convictions affirmed.

ARTHUR J. VIVIANI, Franklin Velie, Richard J. Davis, John W. Nields, Jr., Asst. United States Attorneys, Whitney North Seymour, Jr., United States Attorney, *for Appellee.*

JAY GOLDBERG, New York City, *for Appellant LaSorsa.*

H. ELLIOT WALES, New York City, *for Appellant Caio.*

WATERMAN, *Circuit Judge:*

After a five day jury trial in the United States District Court for the Southern District of New York, the defendants-appellants, Nicholas LaSorsa and Salvatore Caio, charged in a one-count indictment, were convicted of conspiracy to sell heroin without the buyer's written order form in violation of Title 26, United States Code, Sections 4705(a) and 7237(b), and were sentenced to mandatory prison terms of five years each.[1] At the trial, the Government, in seeking to establish the defendants' guilt, rested its case primarily on the testimony of its star witness,

---

1 This was the defendants' second trial upon this indictment. The first ended in a mistrial when the jury was unable to reach a verdict. The first trial began on April 27, 1972 and ended on May 5, 1972, and the trial from which this appeal was taken commenced on October 31, 1972 and concluded on November 6, 1972.

APPENDIX - Court of Appeals Opinion

James Brown, a convicted felon then out on parole from a seven year prison term imposed on him by a New York state court for robbery and conspiracy to kidnap. Brown was named in the indictment as a co-conspirator of the defendants although he was not charged as a codefendant. Upon taking the stand as the Government's key witness, Brown testified that from May 1968, to April 1969, he was employed on a commission basis by the defendants to sell heroin on the defendants' account at prices ranging from $26,000 to $30,000 per kilo. He stated that during this period he was able to arrange a number of transactions in New York City and that for each kilo he sold he received from the defendants a $1,000 sales commission. He also testified that at his initial introductory meeting with the defendants he was instructed by them that whenever he had a buyer who wanted heroin he was to contact the defendants by calling LaSorsa at LaSorsa's place of business, Dale Oldsmobile, and asking for a Mr. Clark. At this first introductory meeting, after LaSorsa had instructed him to call Dale whenever he had a purchaser, LaSorsa also handed him a business card with LaSorsa's private telephone number at Dale handwritten on the card, and this card was introduced into evidence as a government exhibit. He further stated that during the course of his subsequent business relationship with the defendants he had called LaSorsa at Dale many times to inform him that he had set up buys and that he had even visited Dale on about thirty occasions to meet with LaSorsa personally. Brown concluded his testimony by detailing the ways in which he had brokered large quantities of heroin for the defendants during his 11 months of association with them. During this part of his testimony he spoke at length, and apparently convincingly, about the details of his many transactions, and especially about his sales to two retailers

of heroin, "Goldfinger," his Harlem connection, and Luther Hazel, the Government's next witness.

Hazel had been named in one of the overt acts listed in the indictment as furthering the alleged conspiracy, as having received heroin from Brown, and, in the bill of particulars the Government furnished the defense, was characterized as one who "might be considered" a co-conspirator. Hazel's testimony related to an incident which occurred after he had made his first, and only, purchase from Brown. As Hazel's workers had been unable to resell the drugs on the street quickly enough to raise sufficient cash to pay the purchase price of $30,000 he did not make his payment to the defendants on the day it was due. Shortly thereafter he met with Brown and the defendants in an automobile, and while Caio held him at gunpoint in the car LaSorsa demanded payment and, to drive the point home, hit him in the face several times. Eventually Hazel paid $23,500 on account, leaving unpaid a balance of $6,500, plus $2,000 or so borrowed to pay Hazel's packaging helpers. LaSorsa told Brown to forget this balance.

The remainder of the Government's direct case was devoted to introducing evidence tending to support the testimony that had been given by Brown. In order to establish the fact that Caio had been involved with narcotics on other occasions, the Government introduced the testimony of Neil McMillan, a three time felon then serving a Virginia state sentence for his third conviction. McMillan stated that three times during 1968 and 1969 Caio, as part of a separate retailing business, had employed him at a salary of $5,000 a week to dilute and package heroin. Also, in order to verify a Brown statement that he and Tony LaSorsa, brother of Nicholas LaSorsa, had counted in the apartment of Audrey Flynn, Tony's girlfriend, money they had received from "Goldfinger," the govern-

ment produced Flynn, who stated that she had indeed seen Brown and Tony counting money in her apartment.

Neither of the defendants testified in his own behalf, but the defense attempted to prove by other witnesses that the testimony of Brown and Hazel was not to be believed. The owner of Dale Oldsmobile and a current and a former employee of Dale (both of whom had worked at the telephone switchboard) established the fact that no one named Mr. Clark had ever worked at Dale and that, to their knowledge, no one had ever called in and asked for a Mr. Clark. Although this testimony was meant to show that Brown was lying when he said he had called Dale many times and had asked for Mr. Clark, the prosecution established on cross-examination that LaSorsa had a private line at Dale and that calls from Brown to him probably would go through the private line noted on the card he gave Brown rather than through the main switchboard. The defense also attempted to prove that Brown's testimony was not to be believed because it differed from the story he had given to an FBI agent while Brown was an inmate at Sing Sing Prison. Although the defense was able to establish that Brown, when he first spoke to the agent at Sing Sing on July 9, 1970, made some statements that differed from portions of his trial testimony, the Government, on cross-examination of the agent, showed that in most respects the July 9 story was substantially the same as the testimony given at trial, and that, in any event, the story Brown gave at five subsequent meetings in Sing Sing with the same FBI agent was exactly the same story he gave at trial. In any event, the jury believed Brown's trial testimony, and, after one day of deliberation, reached a guilty verdict as to both defendants.

In urging a reversal of their convictions the defendants contend: (1) that the prosecutor's summation was prejudicial and denied the defendants a fair trial, for it unfairly

placed the prestige of the United States Attorney and the United States Bureau of Narcotics behind the testimony of Brown; (2) that the lower court committed "plain error" in failing to charge the jury that accomplice testimony should be "scrutinized with care and caution"; (3) that the lower court erred when it restricted the efforts the defense was making in the cross-examination of Brown and Hazel to establish the bias of these co-conspirators against the defendants; and also erred when it permitted Brown to assert his privilege against self-incrimination at one point during his cross-examination; and (4) that the defendants' sixth amendment right to a jury trial was abrogated by the substitution without the defendants' prior consent of Judge Bauman for Judge Gagliardi as presiding judge on the final day of the trial.

Having carefully reviewed the trial record we find no merit in these contentions, and we affirm the convictions.

I

The defendants first claim that they were denied a fair trial because the prosecutor stated in his summation that the jury should acquit if it believed the Government "framed" the defendants. They claim that the argument was uncalled for by any defense argument and that it unfairly prejudiced the defense in that it bolstered the credibility of the Government's witnesses by placing the Government's prestige behind them. We agree with the defendants that a prosecutor should not bolster the Government's case by placing the prestige of the United States Government behind the witnesses for the prosecution. See *United States* v. *Puco*, 436 F.2d 761, 762 (2 Cir. 1971). Here, by structuring its argument in such a way as to suggest to the jury that if it should vote for acquittal it would be implicitly agreeing with the defendants' insinuations

that the prosecution had "framed" the defendants, it is arguable that the prosecution did place its own prestige behind its witnesses.[2] If the strategy behind this approach was to introduce prejudicial new matter into the case by suggesting that the defense had made insinuations of prosecutorial misconduct that the defense had not really made, it might be that the prosecutor's conduct was prejudicially improper. However, here, it is manifest from even a casual reading of the jury arguments of defense counsel that the prosecution was only meeting the defense on a level of the defense's own choosing. The defense had, indeed, insinuated precisely the type of prosecutorial misconduct which the prosecutor was attempting to refute in his argument to the jury, so, quite justifiably, he argued responsively that the Government had not "framed" the defendants and that, if the jury thought the Government had done so, it should acquit them. The defense arguments to the jury are replete with characterizations of the Government's witnesses as "stars of a little play," "creeps," "the gem of gems" (reference to Brown), and "what a beauty" (reference to Hazel)—all open insinuations that the Government had, without justification, staged a framed prosecution. Moreover, the decision to prosecute the defendants is labeled a "desperate act" and it is argued that the Government used Brown to set up a deal to get Caio and LaSorsa because it needed to obtain convictions to

---

2 For example, during his summation the prosecutor made the following statement:

> Is that what you believe happened? Do you believe Governmental agencies went around and told these people to frame up innocent men? That is an outrageous charge, and if you believe it, acquit, acquit with the Government's blessing, because that is an outrageous thing to do, and nobody in this court, in the House of America, should be convicted on a frame-up of evidence put together in that way. (R. 562).

respond to the public's outcry against narcotics pushers.[3] Also it is suggested that the Government had given favors to the witnesses in return for their assistance although no evidence was introduced during the trial that the witnesses had actually received any. In view of these attacks against the very integrity of the prosecution the prosecutor was certainly entitled to reply with rebutting language suitable to the occasion. See *United States* v. *Benter*, 457 F.2d 1174 (2 Cir.), *cert. denied*, 409 U.S. 842 (1972); *United States* v. *Kravitz*, 281 F.2d 581, 586 (3 Cir. 1960), *cert. denied*, 364 U.S. 941 (1961). The defense allegation that the prosecutor's summation was unfairly prejudicial is without merit.

II

The defendants' next claim is that the trial judge committed reversible error in failing to instruct the jury that in reviewing the evidence it should "scrutinize with care and caution" the uncorroborated testimony of the accomplice witnesses Brown and Hazel. The trial record does not disclose that the defendants' lawyers brought to Judge Gagliardi's direct attention that they wanted him to include such an accomplice witness charge in his instructions to the jury. Moreover, it is conceded by the defendants that they did not except to the charge after Judge Gagliardi had delivered it or that they then suggested such a charge. Despite this, however, they now argue that this court should find that Judge Gagliardi's failure to deliver

---

3 For example, LaSorsa's lawyer during his argument to the jury, said:

> Narcotics is the biggest thing there is in this country right now. And all of us share the same concern for it. All of us share that concern. What does that force the Government to do? It forces the Government to barter and exchange and deal with people like McMillan and Hazel and Brown, and if you do not believe a deal was made in this case with James Brown, then we failed here as attorneys. (R. 541).

an accomplice witness charge sua sponte was "plain error" and that, therefore, we should reverse the convictions. We do not agree.[4] Although we have said that in circumstances where the testimony of accomplice witnesses is an important part of the Government's case the trial judge should, as the recommended practice, instruct the jury to the effect that the testimony of the accomplice witnesses should be "scrutinized with care and caution," we have never required this precise charge to be given unless, by failing to give it, the defendants suffered substantial prejudice. See *United States* v. *Abrams,* 427 F.2d 86 (2 Cir. 1970), *cert. denied,* 400 U.S. 832 (1970); *United States* v. *Cianchetti,* 315 F.2d 584, 592 (2 Cir. 1963). We have carefully reviewed the charge Judge Gagliardi delivered to the jury and the statements made to the jury by the defendants' attorneys during their final arguments, and we are persuaded that the defendants were not prejudiced by Judge Gagliardi's failure to caution the jury specifically that accomplice testimony must be "scrutinized with care and caution." Although these particular words were not used, the certain import of the charge taken as a whole was that the jury should be particularly careful in evaluating the testimony of Brown, Hazel and McMillan. Thus, Judge Gagliardi first reminded the jury that it must ask itself as to each witness whether the witness appeared to be "truthful, candid, frank and forthright," or "evasive, shifty, or otherwise suspect." Then Judge Gagliardi reminded the jury that it must consider as to each witness

---

4 As discussed in text infra we find no "plain error" affecting the substantial rights of either defendant from the failure of the trial judge to instruct the jury in the exact language we have recommended in *United States* v. *Abrams,* text infra; but, in any event, counsel, in disregard of the mandate of Rule 30, Fed. R. Crim. P., did not give the judge the benefit of their approach to the subject so that he could comply with it if he wished to do so. See, e.g., *Pagliochini* v. *United States,* 264 F.2d 583 (D.C.Cir. 1959).

whether his testimony was buttressed or impaired by corroborative or contradictory testimony of some other witnesses, or whether it had been impeached by a showing that it was inconsistent with prior statements, thus indirectly alluding to the fact that the defense had tried to attack Brown by having an FBI agent testify that Brown's trial testimony contradicted certain things he had told the agent on July 9 in a Sing Sing Prison interview. The Judge Gagliardi alerted the jury to the fact that a witness could be impeached by a showing that the witness had been convicted of prior felonies, or by a showing that he had a motive to lie. In this part of the charge Judge Gagliardi stated specifically that Hazel, Brown, and McMillan had been convicted of prior felonies, naming all three of these government witnesses by name. Then Judge Gagliardi took the significant additional step of warning the jury that much of the testimony it had heard from the Government had come from witnesses who "were themselves involved in the alleged conspiracy or in the achievement of its objects." And, to drive this point home, he also noted that: "One of those witnesses, James Brown, is specially named in the indictment as a co-conspirator, although not as a defendant."

From these extensive instructions on the issue of the credibility of the Government's witnesses, we think it is clear that the jury was fully and fairly apprised of the fact that it was to use great caution in weighing the testimony of Brown, Hazel, and McMillan. Moreover, when it is recalled that these instructions were given after defense counsels' pleas, made during their final arguments to the jury, not to believe Brown, Hazel and McMillan because of their past records and their motives to lie, the conclusion becomes even more inescapable that the jury was fully alerted to the necessity of carefully and cautiously scrutinizing the accomplice testimony. See *U.S.* v.

Cianchetti, supra at 592. Accordingly, we find that the defendants were not substantially prejudiced by the trial judge's charge, and that no showing of "plain error" has been made.[5]

III

In its extensive efforts to discredit the testimony of Brown and Hazel the defense emphasized the fact that both of these witnesses had substantial reasons to cooperate with the Government, even to the extent of perjuring themselves.[6] The defense brought this to the jury's attention by introducing, during cross-examination, evidence that the witness may have been granted favors by the Government in return for their testimony (this evidence was refuted) and also by showing that Hazel and Brown may have harbored particular grudges against the defendants because the defendants had allegedly threatened to kill them if they did not keep away from Tony LaSorsa, the defendant LaSorsa's brother; and, further, as to Hazel, that LaSorsa had hit him because he had failed to pay for his heroin on time. At one point during the cross-examination of Brown, LaSorsa's attorney with a view to establishing motive, asked Brown the following question:

---

5 Although relatively unimportant in view of our holding here, we also note that as to Caio the testimony of Hazel and Brown implicating him was corroborated by McMillan.

6 The defense strongly suggested that the Government had arranged for Brown to obtain an expedited parole from the seven year sentence he was serving for a 1969 New York State conviction; that Hazel was permitted to plead to an income tax charge in settlement of an outstanding federal indictment for a narcotics offense; and that McMillan was to receive government help in securing for him an early parole from the serving of his Virginia sentence. These men denied that the prosecutor had made any promises of favors and there was no evidence introduced at trial to show that the prosecutor had, indeed, made any promises; but of course Brown and Hazel were not indicted with Caio and LaSorsa for their respective roles in the charged conspiracy.

"He [defendant LaSorsa] did not tell you to stay away from his brother or he would kill you?" After the question was asked the Government objected and Judge Gagliardi sustained the objection. The defendants argue that it was error to disallow this question because, by disallowing it, the trial judge unfairly limited the defense in its cross-examination of the Government's key witness, Brown. However, this argument is patently frivolous, for when the question is read in connection with the string of questions, noted in the margin, of which it was one, it is obvious that the objectionable question was clearly repetitious.[7]

The defense pursued the same line of questioning in an effort to establish Hazel's motive. The defense argues

---

7 Q. You [Brown] were in the car when Nicholas LaSorsa hit Luther Hazel, weren't you?

A. Yes, I was.

Q. And Nicholas LaSorsa told you at that time if you did not stay away from his brother Tony, you and Hazel, he'd kill you, didn't he?

A. I'm not afraid of Nicholas LaSorsa.

Q. Did he tell you that?

A. He did not tell me that, no.

Q. He did not tell you that?

A. He did not.

Q. He did not tell you to keep away from his brother Tony?

Prosecutor: Objection.

The Court: Sustained. Next question.

Q. Did you refuse to answer yesterday when Mr. Goldberger asked you where you lived in Washington, D.C.? Yes or no.

A. Let me explain it to you.

Q. Just yes or no. Did you refuse to answer?

A. Yes, I did.

Q. Did you tell this court yesterday that you were afraid that Mr. LaSorsa or his family might learn where you lived? Just yes or no. Did you say that yesterday?

A. Yes, I did.

Q. But now you are saying you are not afraid?

A. That's right.

Q. He did not tell you to stay away from his brother or he would kill you?

Prosecutor: Objection.

The Court: Sustained.

(R. 243-244)

that Judge Gagliardi committed reversible error by limiting its cross-examination of Hazel when he sustained the Government's objection to the following question: "Did Nicholas LaSorsa, when he slapped you, [Hazel] tell you that if you and Jimmy Brown did not stay away from his brother Tony he was going to kill the two of you?" We agree with the Government that this ruling was correct as the question assumed an unsubstantiated fact—that Hazel had previously been with LaSorsa's brother Tony. Moreover, even if the ruling were incorrect, the defense was not unfairly prejudiced by its inability to pursue this particular question inasmuch as throughout the trial it had had more than an ample opportunity, of which it took full advantage, to prove that Hazel had substantial reasons to lie. See *United States* v. *Blackwood*, 456 F.2d 526 (2 Cir. 1972), *cert. denied*, 409 U.S. 863 (1972).

Finally, the defendants object to a ruling permitting Brown to refuse to answer, on the ground that the answer might incriminate him, a question put to him by the defense during cross-examination. The defense wanted to bring out that Brown may have committed criminal acts for which he may not have been prosecuted so that it could establish that the reason he testified for the Government was so that the Government would not prosecute him for these past criminal acts of which it had knowledge. Following a conference out of the presence of the jury, the judge and the defense attorneys reached an understanding that for the purpose of establishing Brown's motives in testifying against the defendants the defense could ask Brown about any prior criminal acts he may have committed for which he had not been prosecuted but which were known to the Government. At the same time the judge made clear that he would warn Brown of his constitutional right against self-incrimination if the de-

fense opened the subject. When the jury returned and the cross-examination of Brown commenced, the defense asked the following question: "Mr. Brown, other than the convictions which you have related to the jury, which you have been convicted of, are there any other criminal acts that you have committed?" At this point the Government objected to the form of the question on the ground that it was not phrased in such a way as to alert the jury that the testimony was of limited admissibility and that it was being permitted into evidence only to throw light on the issue of Brown's motives. Judge Gagliardi overruled the government objection, and instructed Brown that he did not have to answer the question if he thought his answer would be incriminating. Thereafter Brown refused to answer the question. The defendants took exception to Brown's refusal to answer—and to Judge Gagliardi's upholding of his refusal—on the ground that during the first trial, which had ended in a hung jury, Brown had admitted committing a robbery with Tony LaSorsa, and that the admission precluded him at this second trial from interposing his fifth amendment privilege as to this particular criminal act.[8] They maintain that as he had already admitted the act at the former inconclusive trial he had thereby waived his right to exercise his fifth amendment privilege at this second trial. However, even assuming *arguendo* that the disclosure during the prior trial of this particular robbery precluded Brown during this second trial from refusing to answer whether he did commit that robbery, an issue we need not discuss,[9] the question he

8 Clearly, the defendants have standing to bring this issue before this court. See 8 Wigmore, Evidence §2270(2) (1961 edition).

9 See our holding in *United States* v. *Seewald*, 450 F.2d 1159, 1164 (2 Cir. 1971) (Oakes, J., dissenting), cert. denied, 405 U.S. 978 (1972). There, the holding in *United States* v. *Miranti*, 253 F.2d 135 (2 Cir. 1958) that a witness who testifies before a grand jury about a criminal act in which he was involved may assert his fifth amendment privilege

was asked went far beyond an inquiry of whether he had committed a robbery with Tony LaSorsa. Brown was not required to answer the broad question he was asked, and the trial judge, in view of this fact, quite properly warned him of his constitutional right. See Wigmore, Evidence §2270(1) (1961 edition).

IV

The defendants claim that they were deprived of their sixth amendment right to a jury trial because on the final day of the trial Judge Bauman sat in for Judge Gagliardi because Judge Gagliardi had become ill. This claim is briefly disposed of. Judge Gagliardi presided at the trial from its inception, October 31, 1972, until the end of the first day of the jury's deliberations, Friday, November 3. Over the weekend he became ill and on Sunday evening he telephoned Judge Bauman at his home and asked Judge Bauman to preside over the remainder of the trial. Judge Bauman indicated he would do so if he could comply with the requirement of Rule 25, Fed. R. Crim. P. that he certify he was familiar with the trial record. Monday morning Judge Bauman held a conference with counsel in the robing room and he certified that he was familiar with the record. He also asked counsel whether there were any objections to his presiding over the remainder of the trial. There were no objections. Judge Bauman then informed counsel that the jury had requested to have some trial

---

against self-incrimination when asked to acknowledge this testimony at a later grand jury proceeding, is held to be limited to similar fact situations. See also *United States* v. *Ellis*, 416 F.2d 791, 800-805 (D.C. Cir. 1969), where the court held, Wright, *J.*, dissenting, that a witness who voluntarily testified before a grand jury without invoking his privilege against self-incrimination, of which he has been advised, waives the privilege and may not thereafter claim it when he is later called to testify as a witness at the trial on the indictment returned by the grand jury.

testimony read back to it and counsel agreed on the portion to be read back. They entered the courtroom, the jury was brought in, and Judge Bauman explained to the jurors why he was sitting for Judge Gagliardi. At this time neither of the defendants voiced any objection to the substitution of the judges, although both of them were seated in the courtroom. Thereafter the requested testimony was read back and the jury retired. Later the foreman sent a second note to Judge Bauman requesting the reading of some additional testimony. The jury was then brought back a second time, it heard the testimony, returned to the jury room, and shortly thereafter returned a guilty verdict as to each defendant. After the announcement of the verdict Judge Bauman stated that, as Judge Gagliardi was more familiar with the facts of the case than he, he would leave the sentencing to Judge Gagliardi unless the defendants objected. There was no objection and Judge Gagliardi imposed sentence on January 15, 1973.

From this account it is evident that Judge Bauman's service as a substitute judge was an extremely limited one. After certifying in accordance with the Rules that he was familiar with the trial record Judge Bauman received two notes from the foreman of the jury, had portions of the trial testimony read back to the jury (which portions were agreed upon by counsel) and received the jury's verdict. He referred the sentencing and the disposition of any post-trial motions to Judge Gagliardi. He made no rulings and committed no acts which could have adversely affected the defendants' rights in any way. Indeed, the defendants do not argue that they were prejudiced by the substitution, but only argue that the substitution was unconstitutional *per se*. However, even assuming that the defendants themselves, despite their inaction and despite the consent of their attorneys, did not themselves consent to the substi-

tution,[10] the claim is without merit under the circumstances obtaining here. See *Connelly* v. *United States*, 249 F.2d 576 (8 Cir. 1957), *cert. denied*, 356 U.S. 921 (1958). The only authority cited by the defendants for the proposition that, irrespective of whether the defense was prejudiced, an unconsented-to substitution of one judge for another violates the sixth amendment, is our court's opinion in *Freeman* v. *United States*, 227 F. 732 (2 Cir. 1915). We are not bound by the holding there for, that case, decided over fifty-five years ago, rested on a principle subsequently repudiated by the United States Supreme Court in *Patton* v. *United States*, 281 U.S. 276 (1930)—the principle that a defendant may not waive his right to a jury trial. See *Cahill* v. *Mayflower Bus Lines, Inc.*, 77 F.2d 838, 840 (2 Cir.), *cert. denied*, 296 U.S. 629 (1935). Inasmuch as the defendants do not claim, and have not shown, that they suffered substantial prejudice from the substitution of judges this claim is without merit.

The convictions are affirmed.

---

10 The Government suggests that under the circumstances of this case the defendants, as a practical matter, have waived their sixth amendment right because their attorneys consented to the substitution and when, in open court, Judge Bauman explained that he was being substituted for Judge Gagliardi, they did not object, although they could easily have done so.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-53

NICHOLAS LASORSA AND SALVATORE CAIO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiracy to sell heroin without a buyer's written order form, in violation of 26 U.S.C. (1964 ed.) 4705(a) and 7237(b). Each petitioner was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App.).

Petitioners contend (1) that the prosecutor used prejudicial language in his summation before the jury; (2) that the trial judge committed "plain error" in failing to instruct the jury fully relative to the caution it should exercise in evaluating the testimony of government witnesses who were accomplices; (3) that the trial judge committed trial errors with respect to certain rulings on the admissibility of evidence; and (4) that

the defendants' right to a jury trial was abrogated by the substitution of one judge for another on the final day of the trial.

Each of the issues raised by petitioners is fully answered in the opinion of the court of appeals, on which we principally rely. We add the following brief comment. Contrary to petitioners' claim, there is no conflict among the courts of appeals as to whether the failure to give a so-called "accomplice instruction" constitutes plain error. The cases cited by petitioners show that the determination whether plain error was committed depends on the record in any given case. See, *e.g.*, *Tillery* v. *United States*, 411 F. 2d 644, 647 (C.A. 5) (cited at Pet. 10) ("The failure to warn a jury about accomplice testimony is not necessarily reversible error in all cases") and *United States* v. *Griffin*, 382 F. 2d 823 (C.A. 6) (cited at Pet. 20-21) (holding that the failure to so instruct the jury is plain error only under "exceptional circumstances"). Here the court of appeals, after "carefully" reviewing "the charge Judge Gagliardi delivered to the jury and the statements made to the jury by the defendants' attorneys during their final arguments" (Pet. App. 9a), concluded that "the defendants were not prejudiced by Judge Gagliardi's failure to caution the jury specifically that accomplice testimony must be 'scrutinized with care and caution'" (*ibid.*). This factual determination does not warrant further review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.

DOJ-1973-08